FILED
APR 2 1943
CHARLES ELMORE CROPLEY

No. 681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

ACME-EVANS COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING OF PETITIONER, ACME-EVANS COMPANY

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Dated March 31, 1943.

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PETITION FOR REHEARING OF PETITIONER, ACME-EVANS COMPANY

Formal Allegations

The petitioner, Acme-Evans Company, prays that this Honorable Court reconsider its Order denying the Petition for a Writ of Certiorari to review the Decree herein of the United States Circuit Court of Appeals for the Seventh Circuit (4A. 333-336*), and respectfully shows to this Honorable Court:

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* The appendix filed by the Board in the lower court was there, and is here, referred to as "P.A." The four volumes of the appendix filed by the Company in the lower court were there, and are here, referred to as "1A.," "2A.," "3A.," and "4A." The proceedings after the petition for enforcement of the Board's order appear in 4A, pages 180 to 340.

Opinions to be Reviewed

The Order of this Honorable Court, denying the petitioner's Petition for a Writ of Certiorari, was rendered March 8, 1943, and is presently not reported. The Opinion of the Circuit Court of Appeals for the Seventh Circuit (4A. 247-257), granting the Board's Petition for an Enforcement Order and denying the petitioner's Petition for Leave to Adduce Additional Evidence, was rendered June 15, 1942, and is reported in 130 F. 2d 477. The Decision and Order of the Board (P. A. 771-839) was rendered May 29, 1940, and is reported in 24 N. L. R. B. 71.

Jurisdiction

This Honorable Court entered its Order denying the petitioner's Petition for a Writ of Certiorari directed to the Circuit Court of Appeals for the Seventh Circuit on Monday, March 8, 1943. This Petition for Rehearing is being filed within twenty-five days after denial of certiorari (or on or before Friday, April 2, 1943) in compliance with the provisions of Rule 33.

Questions Presented

A. General Question—Legality of New Rules of Exclusion

The general question, which the Petition for a Writ of Certiorari in this case is intended to raise, is challenge of the arbitrary practice of the National Labor Relations Board in ruling out of evidence whole classes of material and relevant testimony by the establishment and enforcement of new rules of exclusion never before approved by a judicial tribunal of the Federal Government or of any State. The National Labor Relations Act expressly pro-

vides that in proceedings before the Board, "the rules of evidence prevailing in courts of law or equity shall not be controlling." N. L. R. A., Section 10(b); 49 Stat. 449; 29 U. S. C. A., Sec. 161(b). It is the contention of the petitioner, evidently not sufficiently emphasized in its Petition for a Writ of Certiorari, that there is no basis in the National Labor Relations Act for anything more than a "loosening up" of existing rules of exclusion (particularly as they relate to hearsay), and that the Act is no authority whatever for creating new rules of exclusion not hitherto recognized by courts of law.

It is further the contention of the petitioner that whatever rules of exclusion are recognized and enforced by the Board, they must be enforced equally and impartially as against evidence adduced by the Board and Unions on the one hand, and as against evidence adduced by the employer on the other hand.

It is finally the contention of the petitioner that recognition of unjustified rules of exclusion, and their partial application against one party in favor of the other, constitutes bias and prejudice, as a matter of law, on the part of the Trial Examiner who enforced them, and consequently violates due process of law.

The foregoing general question relates not merely to the procedure followed by the Board in the instant case, but the procedure observed by it in other cases. The problem is further intensified by the tendency of administrative tribunals, generally, to follow the practice of the Labor Board (a) in establishing brand new rules of exclusion logically unsupportable, and (b) of applying them unequally against parties appearing before them. There is consequently every argument of public interest in favor of a

pronouncement by this Court, one way or the other, concerning this drift in administrative law.

The Petition for a Writ of Certiorari also raises several questions relating only to the instant case, and not to the Labor Board, generally.

B—Particular Questions Enumerated

1. Is the General Rule of the Board, excluding Evidence of the Past and Present Criminal Violence and Threats of Labor Unions Due Process, where such Evidence is Offered to Prove the Present Plans and Intentions of those Unions and their Effect on the Mind of an Employer?

2. Is the General Rule of the Board, Excluding Evidence of Union Meetings, Records, and Membership, Due Process, where such Facts are Relevant in a Given Case?

3. Is the General Rule of the Board, Applying Different Rules to Applications of Employers and of the Board for Subpoenas, Due Process?

4. Do the Liberal Provisions of the National Labor Relations Act as to "Rules of Evidence" Permit Application of one Set of Rules to Evidence offered by the Board, and Application of another Set of Rules to Evidence offered by an Employer?

5. Is the Finding of the Board that a Labor Union, which Numbers among its Members Individuals who have Employed Criminal Violence and Threats in their Organizational Activities, may Count such Members in Determining a Majority in Consonance with the Rule of the Supreme Court laid down in the Fansteel Case?

6. Does it Effectuate the Policies of the National Labor Relations Act to require an Employer to Bargain with a Union which has sought to Establish its Right to sit at the Bargaining Table by Criminal Force, Violence and Threats, Rather than by an Election held as Required by the Act?

7. What Constitutes "Material Evidence" and "Reasonable Grounds" for failing to Adduce the same, which will be the Basis for a Successful Petition for Leave to Adduce Additional Evidence pursuant to the Provisions of Section 10(e) of the National Labor Relations Act?

8. Has the Circuit Court of Appeals properly interpreted the Contentions of the Petitioner?

Statement

Factually this case revolves about the motives of the petitioner in discharging three employees—Lowell Chastain, a pay roll clerk, on January 3, 1939; and Ralph Moneymaker and James Nall, truck drivers, on January 10, 1939. All the other issues depend upon the determination of the propriety of these three discharges. If these discharges were proper, and the ensuing strike, which began on January 12, 1939, was consequently not in protest against unfair labor practices, the method followed by the petitioner of hiring new employees upon a permanent basis to take the place of strikers is justified by the decision of the Supreme Court in the *Mackay Radio Case (N.L.R.B.* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333 [1938]).

The petitioner maintains that Chastain was discharged because of (1) the discontinuance of his job; (2) the dis-

closure by Chastain of confidential information respecting the pay roll, rates of pay, and orders of the employer, (3) neglect of duty in that the amount of time he employed in union activities on company time and premises was far in excess of that of any other employee, and (4) continuance of neglect of duty in connection with union matters, after special instructions to discontinue the same, given on December 23, 1938.

The Board maintains Chastain was discharged for discriminatory purposes because of his union activities, whether or not they were on company time and premises.

The petitioner maintains that Ralph Moneymaker and James Nall were discharged because of threats of physical violence, made to fellow-employees after Moneymaker and Nall joined the Teamsters Union; that such threats were in pursuance of the plan of violence which the Teamsters Union generally employed in support of its organizational activities in the Indianapolis area; that a general plan to repeat such plans of violence in the Acme-Evans strike was thoroughly worked out and organized by the leaders of the Teamsters Union and the Federal Union; and that the threats of Moneymaker and Nall actually made (Bd. Finding P.A. 796), when read in the light of the evidence sought to be introduced respecting the past history of the two unions in organizational activities, and their plans for violence in the Acme-Evans case, reasonably led petitioner to believe Moneymaker and Nall meant business, and therefore justified their discharges.

The Board maintains that Moneymaker and Nall were discharged for discriminatory purposes because of their union activities.

There is no contention on the part of the petitioner—and despite the misleading nature of the first six pages of the Circuit Court of Appeals Opinion, no such contention was made in that court—that there is not some evidence in the record (slight though it may be) to sustain the findings of discrimination made by the Labor Board. The petitioner does, however, take the position that so much relevant testimony upon the material issue of motives actuating the three discharges was excluded by the Trial Examiner and the Board that the findings of the Board cannot stand, and that the petitioner's Petition for Leave to Adduce Additional Evidence must consequently be granted.

Were the omitted testimony merely evidence upon miscellaneous matters of fact not related to any general administrative policy of the Board, its omission in this case might not be sufficiently serious and of general public interest to warrant review by this Honorable Court. That certainly is true of the evidence excluded by the Trial Examiner respecting the original discharge of Chastain.

But the exclusion of evidence of the motives actuating the petitioner in case of the discharges of Moneymaker and Nall was brought about by application of novel and revolutionary rules of exclusion being applied by the National Labor Relations Board, not only in the instant case, but in other cases.

In light of the multiplication of administrative tribunals, and their fast growing influence in the Federal System during time of war, it is believed that the Supreme Court is warranted in reviewing this case, particularly inasmuch as the rules of exclusion objected to were applied in time of peace, at a trial occurring from April 10, 1939, to May 5, 1939. This is particularly true inasmuch as the rules of

exclusion were applied only with respect to evidence adduced by the petitioner, and not with respect to very similar blocks of evidence adduced by the Board and the Unions.

Reference is made to the Petition for Writ of Certiorari filed January 29, 1943, for a more particular statement of the facts (pp. 3-6 of such Petition).

Specification of Errors

1. The court below erred in denying the employer's Petition for Leave to Adduce Additional and excluded Evidence.

2. The court below erred in granting the Board's Petition for Enforcement and entering a decree therefor.

Summary of Argument

1. The General Rule of the Board, Excluding Evidence of the Past and Present Violence and Threats of Labor Unions, Violates the Due Process Clause of the Constitution, Where Such Evidence Is Material to the Issues in the Case.

2. The General Rule of the Board, Excluding Evidence of Union Meetings, Records, and Membership, Violates the Due Process Clause of the Constitution, Where Such Evidence Is Material to the Issues in the Case.

3. The General Rule of the Board, Applying Different Rules to Applications of Employers and the Board for Subpoenas, Violates the Due Process Clause of the Constitution.

4. The Liberal Provisions of the National Labor Relations Act as to "Rules of Evidence" Do Not Permit Application of One Set of Rules to Evidence Offered by the Board, and Application of Another Set of Rules to Evidence Offered by an Employer.

5. The Finding of the Board That the Teamsters Union, Which Numbers Among Its Members Individuals Who Have Employed Criminal Violence and Threats in Their Organizational Activities, May Count Such Members in Determining a Majority Is Not in Consonance With the Rule Hitherto Laid Down by This Court in the Fansteel Case.

6. Bargaining With the Teamsters Union Will Not "Effectuate the Policies of the Act."

7. The Employer's Petition for Leave to Adduce Additional Evidence Complies With the Provisions of the National Labor Relations Act.

8. The Circuit Court of Appeals Did Not Correctly Interpret the Contention of the Petitioner.

9. Conclusion.

ARGUMENT

Point One

The General Rule of the Board, Excluding Evidence of the Past and Present Violence and Threats of Labor Unions, violates the Due Process Clause of the Constitution, where such Evidence is Material to the Issues in the Case

The reasons, upon which the National Labor Relations Board depends for its professed right to exclude from the record of an unfair labor practice case evidence of the criminal acts, violence and threats of union members in the course of the controversy involved, have many facets. At bottom, these reasons are doubtless based on the desire of the Board to protect employees in their rights of self-organization; but the scope of the interests the Board has sought to protect has taken in territory for which no justification can be found, if any other interest than the clothing of union activities, whether legal or illegal, in the greatest secrecy is to be served by the administrative process of the National Labor Relations Act.

In the instant case, the reason assigned by the Board for the exclusion of evidence of illegal conspiracy and acts of violence is contained in the following passage from the Decision and Order of the Board:

> "The Trial Examiner refused to allow the respondent to introduce evidence which it claimed would establish violations by strikers of Federal and State laws, where there were no convictions or prosecutions to show that the laws in question had in fact been violated. (See Footnote 67). We have

affirmed his ruling. We do not believe that the policies of the Act would be effectuated were we to constitute ourselves a tribunal to receive evidence, and render judgment, concerning alleged violations of other Federal or State laws." (P.A. 829.)

In footnote 67, referred to in the foregoing quotation, the Board admits the probative nature of the evidence excluded, in the following language:

> "67. To Establish the alleged violation of the Sherman Anti-Trust Act and the alleged illegal conspiracy to commit acts of violence against the respondent's employees and property, the respondent offered evidence concerning the past history of the Teamsters (see footnote 61, *supra*), the occurrences at several meetings of the unions, including the meeting at which the strike was voted, and a list of all the strikers who picketed the plant during the strike. The respondent also offered certain laws, and bills then pending before the Indiana legislature, concerning the stoppage in transit of perishable products." (Footnote 67, P.A. 829.)

In footnote 61, referred to in the preceding text, the Board further reflected upon the soundness of its opinion by admitting the relevant nature of testimony excluded, in the following language:

> "61. This evidence, embodied in numerous offers of proof, consisted of oral testimony and the proceedings in the cases of *Peats* v. *State*, 12 N. E. 270 (1938); *Crickmore* v. *State*, 12 N. E. 266 (1938); and the certified transcript of the complaint and entry by the Marion County, Indiana, Circuit Court in the case of *Penny* v. *Craig* et al., and was of-

> fered to show the respondent's knowledge of the Teamsters' activities and the general reputation of the Teamsters among businessmen in Indianapolis." (Footnote 61, P.A. 826.)

It is submitted that not only is the reason assigned by the Board for its exclusion of evidence improper in the instant case, but it sets forth a rule of evidence which goes far beyond any implications inherent in the National Labor Relations Act.

Section 10 of that Act, relating to "Prevention of Unfair Labor Practices," provides for the proceedings by which unfair labor practices may be redressed. Respecting rules of evidence, it provides:

> "In any such proceeding, the rules of evidence prevailing in courts of law or equity shall not be controlling." (Section 10(b), last sentence.)

The Act further provides as follows:

> "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." (Section 10(e).)

The foregoing two short sentences are the only provisions to which the Board can point to justify the invasion of long-established rules of adjective and substantive law, implicit in the pronouncement quoted above. The principal contention of the petitioner in the hearing before the Trial Examiner was, of course, that the discharges of Chastain, Moneymaker and Nall were not discriminatory. The Board, however, found that the discharges were discriminatory.

Such being the case, the petitioner, faced with the request to reinstate all striking employees, relies upon many authorities, now practically uniform, holding that in the case of either (a) a crime, (b) a tort, or (c) a breach of contract not to strike, committed by the complainant employees **after** commission of an unfair labor practice by an employer, which it is the object of the crime, tort, or breach of contract to correct, the policies of the Act will not be effectuated by reinstatement of such employees.

The doctrine respecting crimes was first established by this Court in an opinion written by Mr. Chief Justice Hughes:

> *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939).

The doctrine as to torts has twice been affirmed by dictum in this Court, and has very recently been approved in quotation by the Circuit Court of Appeals for the Seventh Circuit.

> *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939);
>
> *N.L.R.B.* v. *Sands Manufacturing Co.*, 306 U. S. 332 (1939);
>
> *United Biscuit Company of America* v. *N.L.R.B.*, 128 F. (2d) 771 (1942).

The doctrine as to breach of a contract not to strike has been affirmed by both this Court and the Circuit Court of Appeals for the Seventh Circuit.

> *N.L.R.B.* v. *Sands Manufacturing Co.*, 306 U. S. 332 (1939);

United Biscuit Company of America v. *N.L.R.B.*, 128 F. (2d) 771 (1942).

The decision in the *Fansteel Case,* 306 U. S. 332 (1939) should, of course, have required no further declaration by the Supreme Court. However, because of the decision of the Circuit Court of Appeals for the Third Circuit in *Republic Steel Corp.* v. *N.L.R.B.,* 107 F. (2d) 472 (certiorari denied upon the exclusion of evidence as to violence, but granted upon another ground, and the decision of this Court confined to such other ground (311 U. S. 7 (1939)), the Board has refused to follow the principles laid down by Mr. Chief Justice Hughes and Mr. Justice (now Chief Justice) Stone in the *Fansteel Case.*

It has been the consistent position of the National Labor Relations Board in cases in which an employer sought to prove a crime, a tort, or the breach of a collective bargaining agreement, on the part of strikers, that the Board could not be bothered with the taking of proof upon such matters, but that employers would have to resort to their remedies in the criminal and civil courts of the land. Such a position was taken by the Board in the case of *Southern Steamship Company* v. *N.L.R.B.,* 316 U. S. 31 (1942) and repudiated by the Supreme Court. At the present session, this Court has further repudiated the doctrine in *N.L.R.B.* v. *Indiana and Michigan Electric Co.,* decided January 19, 1943. It is submitted that the decision of the Supreme Court in the two foregoing cases is determinative of the duty of the Board in the premises. Furthermore, in *United Biscuit Company* v. *N.L.R.B.,* 128 F. (2d) 771 (1942), a case, in which an opinion was rendered by the Circuit Court of Appeals for the Seventh Circuit two days after the decision in the instant case (Judge Major sitting in both cases, but

writing the opinion only in the *United Biscuit Company Case*) that Court said:

> "The Board did not find, nor does it argue, that there was no breach of contract by the Union. It stated in its decision: 'The Board does not condone breaches of contract,' and in the next sentence stated: 'But under the circumstances of this case, we cannot agree with the respondent's contention that the drivers and shippers should not be ordered reinstated with back pay.' If the order of reinstatement with back pay was not a complete condonation of the union's breach, then we do not know how that result could be accomplished. In a footnote in its decision, the Board suggests that questions arising from breach of contract are technical common-law issues, not germane to the instant proceeding, and, as we understand, are to be treated by the laws of the state having jurisdiction over actions for breach of contract.
>
> "We reject the contention that a breach of contract between an employer and a Union is irrelevant to the rights and obligations of the contracting parties. We see no reason why the parties to such a contract should not be bound by its provisions, charged with the obligations imposed and entitled to the benefits provided in the same manner and to the same extent as the parties to any other character of contract. Especially is that true of a contract entered into in good faith, and there is no contention here to the contrary. It is also pertinent to observe that no question is raised but that a Union has a right to agree to a provision, such as the one here in controversy, as the result of collective bargaining with the employer."

The Circuit Court of Appeals then went on to explain the doctrine in the *Fansteel Case,* 306 U. S. 240, and to discredit the new rule of exclusion advanced by the Board, refusing to grant the requested enforcement order.

It is submitted that there is nothing in the Act authorizing the Labor Board to create and enforce new rules of exclusion; that refusal to consider competent evidence on material issues for the reason that "the policies of the Act will not be effected" were the Board to "constitute itself a tribunal to receive evidence, and render judgment, concerning alleged violations of other Federal or State laws" is to create and enforce such a new rule of exclusion; and that such creation and enforcement consequently constitutes a deprivation of due process of law under the Fifth Amendment to the Constitution of the United States.

Point Two

The General Rule of the Board, Excluding Evidence of Union Meetings, Records, and Membership, Violates the Due Process Clause of the Constitution, where such Evidence is Material to the Issues in the Case

The second novel and unprecedented rule of exclusion developed by the Board, of which the instant case is an excellent illustration, is the rule of privilege with which the Board has clothed union meetings, minutes and membership cards. Under common and statutory law existing in 1935, when the National Labor Relations Act was adopted, three privileges were chiefly recognized, namely, the privileges of attorney and client, physician and patient, and priest and penitent. True, these have been attacked as unjustified by such prominent jurists as Mr. Chief Justice Taft and Mr. Chief Justice Hughes. The American Law Institute sought at its May 1942 session, in which the "Model Code of Evidence" was adopted, to abolish the hitherto existing privilege between physician and patient. American Law Institute, *Model Code of Evidence,* 1942, pp. 28-30. Certainly, the modern trend is in favor of the abolition of privileged communications, rather than their extension and multiplication.

As stated, the National Labor Relations Board has seen fit in many decisions to encrust a new privilege upon the law—that of labor organizer and employee. Consequently, its Trial Examiners regularly refuse to honor applications for subpoenas filed by employers for the production of witnesses and other evidence relating to union meetings, minutes and membership rolls, although similar applica-

tions filed by Board attorneys and labor leaders, addressed to employers to produce their corporate minutes, stockholders lists, and other confidential records, are honored.

The petitioner pleaded that each of the complaining employees "individually and in combination and in conspiracy with others unlawfully and tortiously, by force, violence and intimidation, sought to obstruct and have obstructed prosecution of respondent's business." (P. A. 20-25.) In support of such allegations and other allegations made in the First Amended Answer of the Respondent, the Employer sought to prove an illegal conspiracy to tie up the Acme-Evans plant by use of force and violence.

The testimony actually admitted in evidence showed that conferences were held at the office of the Employer on January 9 and 10, 1939. The Union representatives claimed they represented at least a majority of the employees, some contending they represented between 80% and 85%. (Woodard 1A. 249; Harrell 1A. 321; Bd.'s Ex. 5, P. A. 843; Williams P. A. 58-9; Resp.'s Ex. 122, 3A. 1493.) Threats were made by the Union leaders at these meetings to enforce their demands by criminal acts and violence. (Woodard 1A. 251; P. A. 399, 400, 401; Harrell P. A. 428, 429, 1A. 18, 326-327.)

Woodard and Harrell were very much concerned by these threats. Woodard was certain that "they were going to carry them out." (Woodard 1A. 261.) Harrell considered Gormley's threats as threats "he would carry out," and would have testified, had he been permitted, that he and his associates "were deeply concerned because they knew that at previous strikes, members of their organization had committed assault and battery and were sent to

the penitentiary for it, upon truck drivers." (Harrell's **Rejected** testimony, 1A. 330-331.)

The plan had been outlined by Gormley. It now remained to call a strike and put the plan in action. A strike meeting was called for the evening of Wednesday, January 11, 1939, and was held at the office of the Teamsters Union at 542 Massachusetts Avenue. (P. A. 54-66, 240; 2A. 781.) It was a joint meeting between members of the Federal Labor Union and the Teamsters Union. (P. A. 66.) Williams and Gormley were both there, and Gormley addressed the meeting. (P. A. 66.) Sweeney, one of the organizers for the Federation, also represented the Teamsters Union. (P. A. 240.) Sweeney addressed the meeting at length. (P. A. 240-241.) Red Travis also addressed the meeting.

The following account is merely a shadow outline of the course the conspiracy took, because, as noted, many of the Employer's offers of testimony were **rejected.**

Sweeney stated that the Union had a majority and that it had one hundred twenty-six members at all events. (Resp.'s **Rejected** Offer of Proof, 2A. 769.) Gormley had, on a previous occasion, promised the men there would be no strike unless the Union had a majority, and, upon that promise and representation, had induced some of them to sign membership cards. (Tr. 2446.) Paul Miller, the President of the Union, stated to the complainant Short that the Union had 80% to 85% of the employees at Acme-Evans in its membership. (Resp.'s **Rejected** Offer of Proof, 2A. 792.) Travis also addressed the meeting and said, "All trucks leaving the Acme-Evans plant would be stopped by the Union with force, and that any trucks getting away from the Acme-Evans plant would, if they got to a loading dock, be turned back because the employees at the loading

dock would refuse to accept the commodities in those trucks or unload the trucks." (Resp.'s **Rejected** Offer of Proof by Complainant Short, 2A. 791; Resp.'s **Rejected** Offer of Proof by Boeldt, 2A. 819; Resp.'s **Rejected** Offer of Proof by Seering, 2A. 1175.) There were only about thirty union employees present at the meeting, including mill workers and truck drivers. (Resp.'s **Rejected** Offer of Proof by Boeldt, 2A. 819; Resp.'s **Rejected** Offer of Proof by Seering, 2A. 1175.) A strike vote was taken, which may have been unanimous (P. A. 241) but certain of the witnesses testified that it was not unanimous and that several of the Union men spoke against it. (Resp.'s **Rejected** Offer of Proof by Symmes, Tr. 2649.)

All of the Complainant employees, who were asked the question and permitted to answer by the Trial Examiner, testified they were present at the Teamsters Union hall on Massachusetts Avenue the night the strike was called. Not one of the complainants testified he voted against the strike. All of them are therefore to be considered as having endorsed (a) the strike, (b) the plan to make it effective, and (c) the use of force advocated by Red Travis. In view of the importance of this testimony, the conduct of the Trial Examiner in excluding so much thereof, is particularly regrettable. If the evidence had not been excluded, and if counsel for the Employer had not been held to such an extreme minimum by the Trial Examiner in making offers of proof, a great deal of valuable testimony as to the conspiracy of the union strikers would have been spread over the pages of the record.

The strike was made effective at the beginning of business on Thursday, January 12, 1939. Every one of the complainants, who was asked and permitted by the

Trial Examiner to answer the question, testified that he (or she in the case of Dorothy Lewellen) was present on the picket line. Ulrey, the Assistant Superintendent, and Beachman, the General Foreman of the Employer, were assigned the duty of compiling an hourly list of picketers and vagrant automobiles about the Acme-Evans plant. The material for this list was collected by these two men alone and was reduced to one composite memorandum by Ulrey and a typist. This memorandum was offered in evidence by the Employer but **rejected.** (Resp.'s **Rejected** Ex. 85; 3A. 1443.) An examination of the various pages of this **rejected** exhibit will show that 26 of the complainants before the Labor Board were, by their personal presence on the picket line, giving comfort to, and aiding and abetting the plans of, the leaders in the strike and the crimes committed pursuant thereto.

Finally, the Trial Examiner refused requests of the Employer for subpoenas duces tecum directed at Williams, Gormley and Chastain looking toward the production of the membership cards of the two Unions. (Resp.'s Ex. 104, 3A. 1455; Resp.'s Ex. 143, 3A. 1516-17.)

The practice of enveloping union affairs in a new privilege followed in the instant case, is merely an example of that generally enforced by Trial Examiners.

In *Matter of Link-Belt Company,* 26 N. L. R. B. 227 (1940),* the Board granted subpoenas duces tecum addressed to an independent union and to the employer, directing them to produce minutes of union and corporate meetings, lists of members and employees, dues records, personnel cards, etc. Inasmuch as not merely the member-

* This is not the case reviewed by the Supreme Court in *N.L.R.B. v. Link-Belt Company,* 311 U. S. 584 (1940).

ship of the independent union and what had transpired at its meetings, but also the membership of the C. I. O. union and what had transpired at its meetings, was relevant, the employer, using identically the language in which the Board had subpoenaed the independent union and the employer to produce such records, made an application for a subpoena duces tecum, addressed to the C. I. O. Union to produce similar records. Both the Trial Examiner and the Board refused to apply an equal rule for all the parties in the case. The headnote in the case indicates that "matters affecting the internal affairs of labor organizations" are not admissible in evidence, thereby giving at least some definition to the basis for the privilege between labor organizer and employee.**

In *Matter of Inland Container Corporation,* — N. L. R. B. —, Case No. R-4811, decided February 11, 1943, the question at issue was the validity of a collective bargaining agreement executed between the employer and a Federal Union on June 1, 1942. The employer took the position that on that date the Federal Union actually represented a ma-

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** The Board reviews its rulings in the following paragraphs:

"During the course of the hearing the respondent made numerous applications to the Trial Examiner for subpoenas and *subpoenas duces tecum* requiring certain officials of Dodge Local 1150 and Ewart Local 2028 to produce the records of the said two unions at the hearing for examination by the parties and for introduction in evidence. * * * Such applications were denied by the Trial Examiner." (26 N.L.R.B. 230.)

"On April 26, 1940, S.W.O.C., on behalf of Dodge Local 1150, filed exceptions to the Intermediate Report. On May 6, 1940, the respondent filed exceptions to the Intermediate Report and to the record and proceedings and requested oral argument before the Board. In its exceptions the respondent alleged that the refusal by the Trial Examiner to issue subpoenas directing Dodge Local 1150 to produce its records had deprived the respondent of the right to adduce evidence upon material issues and that such refusal by the Trial Examiner indicated that he would have refused to receive any evidence of the kind which the respondent sought to elicit by its requests for subpoenas of the kind mentioned above. On this basis the respondent applied to the Board for leave to adduce the evidence alleged to have been so excluded by the Trial Examiner and to adduce further evidence upon all issues." (26 N.L.R.B. 231.)

jority of the employees of the employer, and that the rival C. I. O. Union represented practically none, thereby validating the contract for its term. In order to support its contention, the employer made applications for *subpoenas duces tecum* to both unions to produce membership cards, minutes of union meetings, and similar records. All applications were denied, although the Board made its usual statement (also made in the instant case) that the parties "were afforded full opportunity to be heard, to examine and to cross-examine witnesses, and to introduce evidence bearing on the issues." Although the employer made a Motion to dismiss the petition because the Trial Examiner refused to hear material evidence upon the relevant issues in the cause, the Motion was denied without further statement.

It is again submitted there is nothing in the Act authorizing the blanket privilege of immunity from investigation which the Labor Board has bestowed on the relationship of labor organizer and employee and that an expression by the Supreme Court on the subject is warranted.

Point Three

The General Rule of the Board, Applying Different Rules to Applications of Employers and the Board for Subpoenas, Violates the Due Process Clause of the Constitution

It will perhaps best serve the purposes of orderly presentation to set forth the rulings of the Labor Board and of the Circuit Court of Appeals with respect to the petitioner's contention that the same rules of practice and exclusion were not applied with respect to applications of the Board and of the Employer for subpoenas directed to the person and *duces tecum*.

RULING OF THE BOARD

The discussion and finding of the Board in this respect is as follows:

> "The respondent also asserts that the Trial Examiner did not apply the Board's rules regarding the application for subpoenas as to counsel for the Board and the unions and arbitrarily denied the respondent's applications for subpoenas. There is nothing in the record to support the claim that the respondent was improperly denied subpoenas. Four of the respondent's applications were denied by the Trial Examiner. These were for Lowell Chastain, Hugh Gormley, Joseph Williams, and Bruce Travis, all of whom had previously testified as witnesses for the Board **and had been fully cross-examined by the respondent concerning matters material to the issues in this case.*** The respondent in its appli-

* The Court is asked to judge whether there was any cross-examination, worthy of the name, on the issue of the conspiracy of the Unions to institute a reign of terror at the Employer's plant and perpetrate crimes of violence.

cation requested these witnesses to produce the membership cards of the Teamsters for the years 1935-1938, the membership cards of the Federal for the year 1938. This type of evidence had been properly ruled immaterial to the issues in the case by the Trial Examiner when the respondent sought to elicit it on cross-examination of these and other witnesses. Apart from the respondent's request for the membership records of the Unions, the respondent did not indicate the nature of the evidence it desired to adduce from these witnesses and it does not appear that they would have testified on any matter not fully probed when they first testified **and were cross-examined at the hearing.** One of these witnesses testified when recalled by the respondent for that purpose. It does not appear that the others would not have voluntarily resumed the stand had the respondent requested them to do so. We find that the respondent was not prejudiced by the Trial Examiner's rulings denying its applications for the above-described subpoenas. His rulings are hereby affirmed." (P. A. 776.) **(Bold-faced type ours.)**

RULING OF THE CIRCUIT COURT

The discussion and finding of the Circuit Court of Appeals is as follows:

> "The same may be said of the issuance of subpoenas and the calling of witnesses. We can not say there was bias or prejudice. Witnesses were produced and testified. **They were cross-examined and excused.** Their return and further examination were within the legitimate control of the examiner. It seems to us that their reappearance would have resulted in no gain to either party,—only an extension of the already lengthy record." (4A. 256-7.)

Both of the foregoing findings assume that the petitioner

was permitted the right to examine (whether on direct examination or cross-examination) the three Union leaders, Gormley, Williams and Travis, with respect to the very points which the opinion of the Circuit Court of Appeals says were not established by the petitioner—namely, the fact that Union violence continued to occur **during the four-year period** preceding the hearing in April 1939, and the fact that the same Union leaders, who participated in the *Penny Case* murder of 1935 were directing the plans of violence of the Teamsters Union in 1939.

A chronological analysis of the rulings made by the Trial Examiner and the Board with respect to examination by the petitioner of the three Union leaders (whether direct examination or cross-examination) will best serve the purposes of this Argument. It is accordingly here set forth according to the days of the trial.

THE ACTUAL RECORD AS TO RULINGS ON SUBPOENAS

Board's Case

(First to Fifth Days)

First Day—April 10, 1939

Joe Williams, the organizer of the Teamsters Union, was the first witness called by the Board. As soon as he was delivered to Pantzer for cross-examination, Pantzer, noticing that Gormley, the organizer of the Federal Union, was not present in the Court Room, asked Williams whether Gormley intended to be present personally. When Williams stated he did not know, but that Mr. Sweeney, another organizer who was in the Court Room, might know, Pantzer asked, "Might we have a statement from

Mr. Sweeney, Mr. Examiner, because if I know that he is not, I think I should like to subpoena Mr. Gormley to be here." Weiss, counsel for Gormley, stated, "I am confident, as I understand it, that Mr. Gormley will be here." When Pantzer asked whether Gormley would be produced without the necessity of having a subpoena issued, Weiss answered, "I will advise you sometime this afternoon or tomorrow morning." (P. A. 54-55.)

Pantzer shortly asked Williams to produce the charter and by-laws (but not minutes of meetings) of the Teamsters Union. The Trial Examiner ruled they would have to be produced because this was a representation hearing so far as the Teamsters Union was concerned and proof of the charter and by-laws was an affirmative part of the Board's case. (1A. 3-5.)

Pantzer, of course, wanted the charter and by-laws for the purpose of cross-examining Williams and Travis, the two organizers of the Teamsters Union. **It is noteworthy that they were not produced while either of these witnesses was on the stand, and that Pantzer never subsequently had an opportunity to examine Williams because his subpoena for Williams was denied.**

Pantzer then asked Williams whether Local 135 was not in receivership, Pantzer raising the proper point that inasmuch as a receiver had been appointed for the Local by the Marion County Court, the order appointing the receiver would determine whether or not the Local had the right to represent employees under the Wagner Act, or to bargain for them. This question was **excluded** by the Trial Examiner as not being proper cross-examination, he deciding to apply a strict rule that counsel for the Employer would be limited on cross-examination to points

brought out on direct examination. (It is to be noted that no such limitation was ever inflicted by the Trial Examiner upon his own cross-examination of the Employer's witnesses, or upon that of the Board, he not merely permitting himself complete freedom of cross-examination, but interrupting Pantzer's direct examination of one of the Employer's witnesses as much as 22 times. (4A. 27-29).)

Nevertheless, as the record stood, the Trial Examiner had strictly limited cross-examination on a point as to which the Union had not performed its affirmative obligation to produce either its charter, by-laws, or prove its right to bargain. In light of this ruling, and the subsequent denial of applications for subpoenas addressed to Gormley, Williams and Travis, the three organizers, the finding of the Board, and affirmance by the Circuit Court of Appeals, that denial of such applications for subpoenas was justified because such witnesses "had been fully cross-examined by the respondent" is a travesty of justice. (1A, 6-8.) The situation is made particularly ironic by the comment of the Trial Examiner: "I don't mean that we exactly adhere to it (i. e., the rule that cross-examination will be limited to matters brought out on direct examination) and my rulings shall not preclude your bringing up any matter you desire to when it comes to presenting your side of the case." (1A. 7.)

The Trial Examiner expressly again affirmed his exclusion of the evidence, although Pantzer stated he was entitled on cross-examination, upon a point "germane to the direct examination," to ascertain exactly what the nature of Local 135 was "through which Mr. Williams was operating." (1A. 8.)

The Trial Examiner **excluded** Pantzer's request that Williams produce the membership cards of the Union while Williams was on the stand, so that Pantzer never had an opportunity to examine the membership cards, or to examine Williams, respecting membership, a point made so much of by the Circuit Court of Appeals. (1A. 9-10.)

At the conclusion of Williams's cross-examination in the afternoon session, Pantzer asked Weiss whether he had arranged to have Gormley present, and Weiss stated he could not yet give his assurance. Weiss also stated he did not yet have in court the charter and by-laws of Local 135, and stated, "I have got to discuss the matter with the officers of the Union and determine what the Union officials' pleasure might be in that particular." Weiss lackadaisically stated he would let Pantzer know "what their pleasure was in the next day or so." Pantzer insisted on a definite date so he might issue a subpoena if that was necessary. Pantzer emphasized how important it was to have the charter and by-laws of the Unions present in the examination of Williams, Travis, and Gormley. (1A. 11.) The reaction of the Unions to this reasonable request of Pantzer is to be contrasted with the preparation and production by the Employer, without subpoena, of the elaborate lists of employees requested by the Trial Examiner. (Bd.'s Exhibits 18-A to G, both inclusive (P.A. 853-6), Resp.'s Exhibits 71-81, both inclusive (3A. 1406-41.))

Bruce Travis, an organizer for the Teamsters Union, was the second witness called by the Board. He was not cross-examined by Pantzer on any questions not brought out on direct examination. Naturally, the Union did not bring out on direct examination any matters germane to the Employer's defense. (P.A. 79-82; 1A. 15-19.)

Second Day

Hugh Gormley, an organizer for the Federal Union, testified on the second day. Pantzer limited his cross-examination to the direct examination, which, of course, did not relate to the conspiracy of violence against the Employer, as required by the Trial Examiner. The charter and by-laws of either Union had not yet been produced.

Third Day

On the morning of this day, when Pantzer was cross-examining Charles Baker, the Trial Examiner again strictly applied the rule which he had applied in the cross-examination of Gormley and Williams to counsel for the Employer by narrowly limiting the cross-examination. Pantzer had begun to cross-examine Baker with respect to the acts of violence committed by the Unions in pursuance of their conspiracy of violence against the Employer. The letter of March 11th discharging Baker had referred to participation in such violence. The record is here set forth as follows:

> "Q. (By MR. PANTZER.) Well, do you know that Rieger pleaded guilty to assault and battery?
>
> MR. JACOB WEISS: We object to that question on the same grounds.
>
> TRIAL EXAMINER LOHM: Sustained.
>
> MR. PANTZER: Well, now, you are ruling evidence out which may become very important in connection with our letter of March 11th, Mr. Examiner.
>
> TRIAL EXAMINER LOHM: The Board is putting on its case now and after the Board rests, the opportunity will, of course, be accorded the

Respondent to then put on its case. As I understand, counsel for the Respondent is cross-examining this witness.

MR. PANTZER: All right. If you are going to apply the rule as to cross-examination strictly, why then the rule is well applied. I had understood in previous Labor Board cases that the rule was very liberally applied and the Trial Examiners have been very liberal in permitting the whole case to go in whenever a witness was on the stand.

Now, Mr. Baker, I ask that you hold yourself in readiness for being called to the witness stand when we go on with our direct case, and I should like to have all of their witnesses, including Mr. Gormley and Mr. Williams, held for that purpose. In other words, if we are not to be permitted to cross-examine these persons, I do not wish to have them absent when we put on our case.

TRIAL EXAMINER LOHM: The Trial Examiner is not making any general ruling at this time. I will rule on specific matters as they are raised.

MR. PANTZER: I would like to have this witness instructed to be available when we are in the course of putting on our direct case.

TRIAL EXAMINER LOHM: The matter will rest with your request to the witness. I find myself without any authority to give him any such instructions.

MR. PANTZER: Then I repeat my request." (P.A. 265-266.)

In the afternoon of the third day, during the examination of John E. Judson, a witness called by the Board, Pantzer again asked for the constitution and by-laws, and,

when he was advised that they would be produced Thursday, commented gently upon the repeated failure to produce the documents. Pantzer also asked Chelf, the counsel for the Board, whether he would have an officer of the Union put on the stand for cross-examination, whom Pantzer could ask questions, and Weiss stated, "You can call any witness you want." (P.A. 303.)

It is to be kept in mind that at this time, Williams, Travis and Gormley, the three Union organizers, had already testified. (4A. 4, 6, 10.) Pantzer must therefore have expected an opportunity further to examine these three men, and Weiss' answer must have been an acquiescence toward granting such opportunity, at least as to cross-examination with respect to the documents then being discussed.

Fourth Day

On the morning of this day, the Trial Examiner, having on the third day failed to show any co-operation toward the Employer with respect to production of witnesses, Chelf, the Board's counsel, asked that Clarence Short and Otis Stinnett, two employees of Acme-Evans Company, be produced by the Employer. The Trial Examiner asked, "Have you issued subpoenas for them?" and when Chelf replied he had not, the Trial Examiner added, "Well, I feel quite sure that counsel for the Respondent will co-operate with you and have any employees you wish here." (Tr. 660—not in printed Appendix.) Pantzer then instructed Ulrey, one of the employees of Acme-Evans Company, "to step out and get some men at the plant working to see if they can run down Mr. Stinnett and Mr. Short and get them here right away." (P. A. 329-30.)

The witnesses were then produced and testified in short order.

Fifth Day

At the beginning of the fifth day of the trial, and the last day of the Board's case, Pantzer again asked whether the charter of the Federal Union was available. Chelf answered disingeniously, that "since the opening day of the hearing neither Mr. Sweeney nor Mr. Gormley has been present in the Court Room, and I haven't had an opportunity to contact either of them for the purpose of securing from them the constitution and by-laws," (Tr. 834—not in printed Appendix), although Gormley had actually been on the stand the second day of the trial. (4A. 6.)

Early on the fifth day, when Chelf desired to have George C. Dapp, "at present employed as Welfare Man or Personnel Director" by the Employer, testify, he called the witness in open court without making an application for a subpoena. The record demonstrates the informal practice approved by the Trial Examiner, which was established where members of the Employer's staff were desired for witnesses by Board's counsel.

> "MR. CHELF: And I would like to state at this time that prior to the Board's resting of the case we would like to call to the stand Mr. George C. Dapp, at present employed as welfare man or personnel director, or in whatever capacity he may now be employed in the Acme-Evans Company.
>
> MR. PANTZER: Go ahead and call him.
>
> MR. CHELF: Well, I have made that statement so that the record will indicate that we will call him.

TRIAL EXAMINER LOHM: Gentlemen, these are not matters that ought to go into the record.

Mr. Chelf, you know how to get a witness. You should, out of the hearing, request him to come or serve a subpoena on him. There isn't any need for all of this space being taken up in the record with these sort of discussions.

MR. CHELF: I am sorry, sir. Let it be stricken physically from the record.

TRIAL EXAMINER LOHM: No, let it stand.

MR. PANTZER: No.

TRIAL EXAMINER LOHM: But handle it the other way, sir.

MR. PANTZER: I want it to show how the witness was asked to come to this hearing.

MR. EZRA WEISS: Mr. Examiner, I would like to make a statement. It is my understanding that counsel for the Respondent made a statement for the record that in the event we would like to call any employee of the Respondent, that the Respondent would cooperate with us by calling them on the telephone and getting them down.

TRIAL EXAMINER LOHM: That is quite true, but you need not take up the time of the hearing or the space of the record in doing that. All of those things can be attended to prior to the convening of the hearing or in recesses, outside of the record.

MR. PANTZER: And I made that statement again yesterday, and I said all we would require was giving us notice in advance.

TRIAL EXAMINER LOHM: Nothing is gained by filling up the record with that.

MR. CHELF: That is all I was doing; giving them notice in advance. I don't expect to call this witness for sometime; at least until we conclude with the witnesses I have this morning."
(Tr. 837-38—not in printed Appendix.)

Dapp was promptly produced by the employer and testified for the board.

Just as the Board's case was being concluded, at the end of the fifth day, the charter for the Federal Labor Union was finally produced by the Board and submitted in evidence. (Tr. 1003-4—not in printed Appendix.)

The Employer's Case

(Sixth Day to Eighteenth Day)

Tenth Day

During this day, Pantzer, finding Travis in the Court Room, called him to the stand by surprise. Travis, who had been a member of the Teamsters Union since 1929 and was one of the incorporators of Local 135, was not permitted to answer whether Victor Crickmore, Harry Peats, Joe Williams, Gerald Haygood, and others were members of the Teamsters Union. This testimony, so material to the Employer's Case according to the opinion of the Circuit Court of Appeals, was **excluded** by the Trial Examiner. When Travis failed to "remember" or to answer questions put by Pantzer, Pantzer stated that Travis was a "hostile witness" in justification of leading questions put to him. The Trial Examiner thereupon stated, "The objection is sustained, and I think it is my duty to state that I don't think counsel for the Respondent was justified in terming the witness a hostile witness. He has

promptly answered every question propounded to him and voluntarily come to the stand on the request of counsel for the Respondent." (1A. 569-573.) The Court is asked to consider the record to find out whether either the Trial Examiner or Travis intended to permit the Employer to introduce any testimony relating to the four-year period considered so important by the Circuit Court of Appeals.

Eleventh Day and Following

From the time that Travis was called to the stand by surprise, Gormley and Williams studiously avoided the Court Room and did not again enter it during the last ten days of the trial. Furthermore, inasmuch as Travis had not been permitted, when called by Pantzer, to testify as to membership in the Union, Pantzer was forced to make applications for subpoenas for Joe Williams, Bruce Travis, and Hugh Gormley, and the membership cards of the two Unions. Nevertheless Respondent's applications for subpoenas addressed to Emmett Joseph Williams, with a request to produce the membership cards of the Teamsters Union (Resp.'s Ex. 100, Tr. 2099—not printed in Appendix); Bruce Travis (Resp.'s Ex. No. 102, 3A. 1454); Bruce Travis (Resp.'s Ex. No. 103, 3A. 1455); Hugh Gormley, with a request to produce the membership cards of the Federal Union (Resp.'s Ex. No. 104, 3A. 1456) Hugh Gormley, personal (Resp.'s Ex. No. 108, 3A. 1459); Emmett J. Williams, personal (Resp.'s Ex. 109, 3A. 1459); and Lowell Chastain, with a request to produce the membership cards of the Federal Union (Resp.'s Ex. 143, 3A. 1516-7) were all denied by the Trial Examiner.

When the Employer made the application for the subpoena *duces tecum* directed to Emmett Joseph Williams,

Weiss asked for copies, and the Employer provided them. Trial Examiner Lohm, in an off-the-record remark, explained that copies should be furnished counsel for the Board and the Union for their information, in order to facilitate objections. (Tr. 2099-2100—not in printed Appendix.)

When, on the thirteenth day of the hearing, Pantzer filed his application for a subpoena directed to Bruce Travis (Resp.'s Ex. 102), Travis was at the moment sitting in the Court Room and Pantzer, in addition to serving a copy of the request for subpoena on counsel for the Board, suggested that it ought to be issued and served immediately while Travis was still available. The Trial Examiner stated he would pass on the request "at a later time during the hearing." Pantzer asked what further steps might be taken "to make certain these witnesses will be available when subpoenas are served," and when the Trial Examiner refused to give the matter immediate attention, excepted. (Tr. 2183-4—not in printed Appendix.) The Trial Examiner denied the application for a subpoena for Bruce Travis. (Tr. 2221—not in printed Appendix.) It is noteworthy that after this denial, neither Gormley, Williams nor Travis was ever again in the Court Room throughout the balance of the trial.

The application for a subpoena *duces tecum* addressed to Hugh Gormley (Resp.'s Ex. No. 104, 3A. 1455-6) was filed by Pantzer, a copy being presented to counsel for the Board. (Tr. 2371—not in printed Appendix.) Although the Trial Examiner agreed to rule upon the application later in the day, he did not deny it until the beginning of the next day. (Tr. 2605—not in printed Appendix.)

The Trial Examiner again delayed ruling on the requests for subpoenas for Hugh Gormley and Emmett J. Williams. (Resp.'s Exs. 108 and 109, 3A. 1459.) Each of the applications was denied. (Tr. 2775—not in printed Appendix.)

It is submitted that in light of the actual record, as set forth above, the finding of the Board that "the Respondent was not prejudiced by the Trial Examiner's rulings, denying its applications for the above-described subpoenas," is unreasonable and arbitrary, and that the Respondent was denied an opportunity to prove its affirmative defense.

It will be seen, from an examination of the foregoing statement of the record as to the attempts made by the Employer to examine or cross-examine the Union organizers with respect to the conspiracy to perform acts of violence in support of the strike and the actual carrying out of such conspiracy, that the Employer was afforded absolutely no such opportunity, despite everything that the Labor Board has found.

UNFAIR APPLICATION OF RULE 21 BY THE TRIAL EXAMINER

But Section 21 of the Rules and Regulation of the National Labor Relations Board, Series 1, which was in effect at the time of the hearing, was even more unfairly administered by the Trial Examiner. Section 21 read as follows at the time of the hearing:

> "Sec. 21. Any member of the Board may issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents

> that relate to any matter under investigation or in question, before the Board, its member, agent, or agency, conducting the hearing or investigation. Applications for the issuance of such subpoenas may be filed by any party to the proceedings with the Regional Director, or, during the hearing, with the Trial Examiner. Such applications shall be timely and shall specify the name of the witness and the nature of the facts to be proved by him, and must specify the documents, the production of which is desired, with such particularity as will enable them to be identified for purposes of production."

A full statement of the practice followed by the Board and the Trial Examiner under this rule is set forth in the "Affidavit of Kurt F. Pantzer, Attorney for Acme-Evans Company," appended as Exhibit A to the Petition for Leave to Adduce Additional Evidence." (4A. 198.)

The Board admitted in the Circuit Court of Appeals (Board's Answer Brief, pp. 10-14) it was the practice of the Board at the time of the hearing to require counsel for an employer, but not Board counsel, to submit to the Examiner applications for subpoena, which were desired during the course of the hearing, specifying the names of witnesses and the nature of facts to be proved.

It is consequently submitted that the general rule of exclusion, referred to at Point One of this brief, enforced by the Board in the instant case, has been very much implemented by the further rule of exclusion directed at preventing the Employer from calling the organizers of the two Unions to the stand. Because of the example of the Labor Board in setting the pace and tempo for many other administrative tribunals, it is submitted its practice should be reviewed by this Court so as to obtain judicial direction in the matter.

Point Four

The liberal provisions of the National Labor Relations Act as to "Rules of Evidence" do not permit application of one set of rules to evidence offered by the Board, and application of another set of rules to evidence offered by an Employer.

The three foregoing Points of this Argument establish the chief basis for the Petitioner's claim to be granted rehearing. The questions presented by those Points are of national moment, inasmuch as they relate to the right of an administrative tribunal to go outside the elaborate provisions of the Act which created it, and beyond the conception of "due process" existing at the time the Act was adopted, in working out new rules of substantive law and evidence. Mere statutory authorization to formulate and promulgate rules of procedure cannot, under any possible conception, be interpreted to include the right of prohibiting a party from proving the material issues of its case for the consideration of the administrative tribunal.

We do not know whether, in this changing world, the practices of the Labor Board, exemplified in the case, will add to, or detract from, enjoyment of the form of Government conferred by the American constitution. We do feel that pronouncement by the Supreme Court is warranted.

Similarity to the Arlidge Case

The situation resembles closely that in the much debated case of *Local Government Board v. Arlidge,* 1915 A. C. 120 (1914). In that case the House of Lords had before it an appeal from a local Government Board which had adopted the rule that reports made to it on matters

In like manner, procedure effecting the physical exclusion of aliens need not necessarily set up nearly as strict requirements for hearing the facts as are contained in the judicial procedure effecting exclusion of testimony of an American Corporation or citizen.

Low Wah Suey v. *Backus,* 225 U. S. 460 (1911);

Ung Back Foon v. *Prentis,* 227 Fed. 406 (1915).

Similarly, tribunals administering the fundamental avenues of interstate communication of the nation are, by tradition, entitled to enforce stricter rather than looser rules of exclusion.

Interstate Commerce Commission v. *Louisville Railroad,* 227 U. S. 88 (1912);

Degge v. *Hitchcock,* 229 U. S. 162 (1913);

Smith v. *Hitchcock,* 226 U. S. 53 (1912).

In the instant case, we are dealing with an administrative tribunal constituted under an Act which sets out much more elaborate procedure than usual insuring fair trial, and specifying exactly the two respects in which the rules of evidence may deviate from normal. (See *supra,* p. 13.) It is consequently submitted that none of the gauges of fairness and due process considered in the foregoing cases applies to the instant case.

Equality of Enforcement of Rules

But whatever the rules of exclusion promulgated and enforced by the Labor Board and approved by this Court, such rules should be applied with equal strictness to both parties.

of sanitation by its technical inspector might be considered by it as evidence, but that the identity of the technical inspector need not be disclosed to the other party. The Court held that such procedure was proper.

Since decision of the *Arlidge Case* it has been a favorite springboard for discussion of problems relating to the fairness of hearings in administrative law. It is submitted that the instant case may well be the *Arlidge Case* of the present decade, particularly inasmuch as it poses so clearly three questions with respect to administrative exclusion of evidence for which the practice of the Labor Board is being sited as authority in other administrative tribunals.

Applicability to Other Tribunals

It may, of course, be properly said that examination of the trial procedure of the Labor Board will not necessarily lay out signposts for guidance of other administrative commissions. The procedure of each tribunal must, of necessity, be governed by consideration, first, of the existence or lack of niceties of procedural direction in the enabling statute; second, the purpose expressed in such statute; and, last, the unexpressed basic political, economic and social functions which the tribunal is established to serve.

It goes without saying that the considerations attending constitutionality of procedure for a general assessment of taxes, affecting the whole community, are not nearly so restricted as in the case of a statute which sets up an elaborate mechanism for trying facts as between individuals.

Bi-Metallic Co. v. Colorado, 239 U. S. 441 (1915); *Londoner v. Denver*, 210 U. S. 373 (1907).

When the Board is permitted to go into the past labor history of the Acme-Evans Company in the greatest detail, it must be inequitable to prevent the employer from going into the past organizational activities of the Union, particularly where such activities throw a light upon the preventive measures taken by the Employer to avoid bloodshed and injury on the part of its employees.

When the Board is permitted to interrogate the witness Dapp with respect to labor experiences had by him in the course of a strike occurring to a previous employer, but the employer is denied the right to interrogate Dapp as to union experiences had by him in the same strike, the union leader in that strike being Bruce Travis, something inequitable has been perpetrated.

When the rule respecting scope of cross-examination is applied with strictness to the Employer and disregarded completely in the case of cross-examination by the Board; and when further the Trial Examiner, not merely cross-examines, himself, but interrupts direct examination by the employer, to effect such cross-examination, procedural justice is not being achieved.

The only function which judicial review can have with respect to the arbitrary and capricious conduct of the trial by the Trial Examiner is a **"trial of the trial"**. Professor Nathan Isaacs has aptly stated the situation in his article, "Review of Administrative Findings", 30 Yale Law Journal 781, 795, where he says:

> **"The Interstate Commerce Commission, organized in 1887, had for some time been functioning as a court. The road to judicial review had, however, been left open by the statute creating the body and its amendments. The findings of the commission**

> were to carry with them a presumption of correctness. There was nothing final, however, in its conclusions either of law or of fact. In the last two decades, however, particularly in 1912, a remarkable degree of finality has been given to the decisions of this most famous of commissions. In *Interstate Commerce Commission v. Union Pacific Railroad Co.*, 222 U. S. 541, 32 Sup. Ct. 108 (1912), the Court said what had long been true in effect; that it would not review the findings of the commissioners to see whether it would have made a similar ruling under the same conditions, that it was concerned only with the question of whether the commissioners had proceeded properly. **In other words, there would be a 'trial of the trial' only, and not of the merits."**

The objections taken by the Employer to the various unequal administrative practices employed by the Trial Examiner are set forth in detail in its "Exceptions to Intermediate Report," (P. A. 749-758).

The leading cases in administrative law hold that unreasonable and arbitrary action on the part of the presiding officer at an administrative hearing is bias in point of law. When, therefore, the decision of the Circuit Court of Appeals holds that the procedure and conduct complained of in the first four Points of this Argument does not constitute bias and prejudice as a matter of law, it fails to follow the paramount authorities.

> *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 225 (1938).

Point Five

The Finding of the Board that the Teamsters Union, which Numbers among its Members Individuals who have employed Criminal Violence and Threats in their Organizational Activities, May Count such Members in Determining a Majority Is not in Consonance with the Rule Hitherto Laid Down by this Court in the Fansteel Case

It is a fact that no demand for collective bargaining was made by the Teamsters Union prior to the strike, which began on January 12, 1939. The organizer for that Union testified of the meetings with company representatives held on January 9 and 10, 1939, that: "We told them we wasn't there to negotiate any agreement" (Williams, P. A. 44). "We asked why the drivers were discharged" (Williams, P. A. 45) and "did not undertake on that occasion to take up with the Company any contract." (Williams, P. A. 45.)

The point of the Respondent's argument upon the issue of refusal to bargain is that Williams made no demand in behalf of the Teamsters Union that the Respondent bargain until February 9, 1939, when he called on the Company representatives with a draft of contract and Reis told him that Harrell and Woodard were out of the City and would get in touch with him at a future date. (Williams, P. A. 45.)

Williams testified at length on the stand about the conference in Pantzer's office, in which the demand for bargaining was made. (Williams, P. A., 68-75; Board's Exhibits Nos. 4 and 5, P. A. 842-5.)

The petitioner insisted that before it recognized the Teamsters Union as a representative of (a) a majority of its employees, (b) eligible to vote and be represented, (c) in a proper bargaining unit the Union prove those three facts.

The conferences which began on February 9, 1939, occurred after the members of the Teamsters had participated in the various crimes, acts and threats of violence, most of which the petitioner was prevented from proving in evidence. The petitioner consequently took the position, justified by the doctrine in the *Fansteel Case* and the case of *Standard Lime & Stone Co.* v. *N. L. R. B.*, 97 F (2d) 531 (1938) that mere acts and threats of violence on the part of the striking Teamsters disqualified them from being included among the employees eligible for inclusion in the bargaining unit whether or not they were discharged. In the *Fansteel Case,* Chief Justice Hughes said:

> "In view of the change in the situation by reason of the valid discharge of the 'sit-down' strikers and the filling of positions with new men, we see no basis for a conclusion that after the resumption of work Lodge 66 was the choice of a majority of respondent's employees for the purpose of collective bargaining. The Board's order properly requires respondent to desist from interfering in any manner with its employees in the exercise of their right to self-organization and to bargain collectively through representatives of their own choosing. **But it is a different matter to require respondent to treat Lodge 66 in the altered circumstances as such a representative. If it is contended that Lodge 66 is the choice of the employees, the Board has abundant authority to settle the question by requiring an election."** (pp. 261-262.) (Blackfaced type ours.)

It is perfectly evident that the opinion of the majority of the Court covered employees who had aided and abetted in the strike but who had not been technically discharged, as well as those who had been discharged. This is made clear by the qualification in the concurring opinion of Mr. Justice (now Chief Justice) Stone, who said:

> "As to the fourteen employees who aided and abetted the sit-down strike, but who were not discharged, I think they retained their status under § 2(3), and that the Board had power to reinstate them. Whether that power should be exercised was a matter committed to the Board's discretion, not ours.
>
> "In other respects I concur with the decision of the Court." (p. 265.)

The doctrine of the *Fansteel Case* is therefore at direct variance with the ruling of the Board in this respect. It came to the opposite conclusion, saying:

> "The respondent also urges that its striking truck drivers lost their employee status by engaging in some of the altercations during the strike. We cannot concur in this argument. **The respondent had not interrupted their employee status on the dates it refused to bargain.** Its subsequent termination of the employment of some of the drivers, for the alleged reason that they engaged in the strike altercations, was in violation of the Act. Under these circumstances we find that the respondent's assignment of this ground as an excuse for its refusal to bargain was a further attempt to avoid its obligations under Section 8(5) of the Act." (P. A. 826.) (Blackfaced type ours.)

If the majority opinion of Mr. Chief Justice Hughes is still law, there is no justification for the conclusion of the Board.

But irrespective of the difference in opinion between Mr. Chief Justice Hughes and Mr. Justice (now Chief Justice) Stone the respondent in open court through Reis, its Vice-President, and Pantzer, its counsel, openly discharged all employees in any way implicated or participating in the violence of the strike and asked counsel for the unions to convey the message to all employees (Reis, P. A. 545-6). In this respect the discharge of all employees aiding and abetting those who were guilty of violence was similar to the general discharge in the *Fansteel Case,* 306 U. S. 248, 249, 259 (1939). All implicated in the conspiracy were consequently properly discharged and not subject to reinstatement.

In conclusion, it is therefor submitted that, as suggested by Mr. Chief Justice Hughes the Board should have ordered an election among the **eligible** truck drivers of the Petitioner, rather than order the Petitioner to bargain without the benefit of an election.

Point Six

Bargaining with the Teamsters Union Will not "Effectuate the Policies of the Act"

The Employer's contention that it was justified in refusing to bargain with Local 135, upon the basis of the showing of **employees ineligible** to be represented in collective bargaining, has already been made at Point Five of this Argument. This Point is devoted to the Employer's claim that the **Union** had forfeited its right to bargain.

The position of the Board respecting the claim of the Employer upon this feature of the case was disposed of by the Board in the following language:

> "The respondent finally contends that it was under no obligation to bargain with the Teamsters **because it disliked the past history and reputation of the Teamsters, its officers and members.*** To establish such history and reputation, the respondent offered evidence which was excluded by the Trial Examiner. We find that evidence of the past history and reputation of the Teamsters was properly excluded in so far as it was offered as a defense to the respondent's refusal to bargain. We find no merit in the respondent's contention. As was stated by the court in *National Labor Relations Board* v. *Remington Rand, Inc.*
>
> > Though the union may have misconducted itself, it has a *locus poenitentiae;* if it offers in good faith to treat (with the employer), the employer may not refuse because of its past sins." (P. A. 826.) (**Blackfaced type ours.**)

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* This sarcasm does the Petitioner injustice and misses the mark of Mr. Chief Justice Hughes's statement in the *Fansteel Case.*

The following footnote to the second sentence above indicates very clearly the kind of evidence which the Board felt justified in excluding:

> "This evidence, embodied in numerous offers of proof, consisted of oral testimony and the proceedings in the cases of *Peats* v. *State,* 12 N. E. 270 (1938), *Crickmore* v. *State,* 12 N. E. 266 (1938) and the certified transcript of the complaint and entry by the Marion County, Indiana, Circuit Court in the case of *Penny* v. *Craig et al.*, and was offered to show the respondent's knowledge of the Teamster's activities and the general reputation of the Teamsters among businessmen in Indianapolis." (Footnote 61, P. A. 826.)

The two quotations seem to proceed on the erroneous theory followed by the Circuit Court of Appeals, namely, that all the evidence excluded related to a period four years prior to the strike.

It is submitted that if the plea of the Employer respecting the improper exclusion of evidence as to its reasons for discharging and refusing to reinstate employees is valid, it applies as well to its reasons for refusing to bargain with the Teamsters Union. The Supreme Court most recently passed upon the use of violence to enforce a request to bargain by a union in *Southern Steamship Company* v. *N. L. R. B.* (decided April 6, 1942), in which Mr. Justice Byrnes said:

> "It should be stressed that the view we have taken does not prevent the redress of grievances under the Act. **At any time following the certification of the N.M.U. in January, 1938, the union and the Board could have secured the assistance of the courts in forcing petitioner to bargain. The importance of seeking such assistance promptly is**

> **strikingly illustrated in this case. Had the union and the Board done so, the unfortunate occurrence at Houston might have been averted.** And what is more, nothing that we have said would prevent the union from striking, picketing or resorting to any other means of self-help, so long as the time and place it chooses do not come within the express prohibition of Congress." **(Boldfaced type ours.)**

Although the Board has found that the Employer refused to bargain with the Teamsters Union, it is submitted that it will not effectuate the policies of the Act to force employers to bargain with unions who use force and violence in support of their demands. Mr. Justice Hughes spoke at great length in the *Fansteel Case,* 306 U. S. 240 (1939), as to how much the use of force by unions ran directly in the face of the "policies of the Act" and consequently use of force should be discouraged, rather than encouraged, by the Board in effectuating those policies.

The Circuit Court of Appeals for the Seventh Circuit recently said, in a similar case where breach of contract by the union **after an unfair labor practice by the employer** was the wrong complained of:

> "It is true, petitioner did not actually discharge the employees for this breach, and we need not decide whether the relation of employer and employee was actually terminated. **The breach, so we think, exonerated the petitioner from the obligation of bargaining further with this Union on behalf of the drivers and shippers, and it was not required to displace new employees in order to make room for those who had breached their contract."** *United Biscuit Company* v. *N. L. R. B.,* 128 F. 2d 771 (1942). (Blackfaced type ours.)

It is further submitted that before passing upon the question as to whether or not the policies of the Act will be effectuated by the order of the Board, the evidence upon the subject be introduced at length. **Actual testimony** is always a more living form of fact than the cold, colorless data incorporated in Offers of Proof.

Point Seven

The Employer's Petition for Leave to Adduce Additional Evidence Complied with the Provisions of the National Labor Relations Act

The provision of the National Labor Relations Act respecting petitions for leave to adduce additional evidence is as follows:

> "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript." (N. L. R. A. Section 10(e); 49 Stat. 449; 29 U. S. C. A. Section 161(e).)

Under the decisions of this Court, the evidence sought to be adduced must either have been offered at the Labor Board hearing, and improperly denied by it, or must have been unavailable at that time.

> *Consolidated Edison Company* v. *N. L. R. B.*, 305 U. S. 197 (1938);
> *N. L. R. B.* v. *Indiana and Michigan Electric Company*—U. S., decided January 19, 1943.

In the case of testimony sought to be elicited by the Employer upon the cross-examination of the Board's witnesses, the Employer was, of course, unable to make offers of proof because counsel is rarely capable of predicting

what a hostile witness will say upon cross-examination. Counsel for the Employer, consequently, was forced to rely upon the exceptions to exclusions of testimony in the cases of all hostile witnesses.

In the matter of friendly witnesses the Employer made repeated offers of proof. Specific reference to these made on all subjects relating to motive including the motive for discharging Chastain, will be found in the Cumulative Appendix of Rejected Evidence (4A. 3-22). A statement of the excluded testimony offered on the subject of violence, alone, condensed into nineteen pages will be found in the Petition for Rehearing in the Circuit Court of Appeals (4A. 271-290).

The mere fact the Employer did not make offers of proof of all available instances of acts of violence, the reputation of the unions for violence, and the plan or conspiracy of the unions, does not constitute the actual offers of proof made by the Employer insufficient, because it was sufficient for the Employer to establish the type of evidence which it intended to adduce.

> "But a specific offer of evidence is not needed where an *entire class of evidence* has been in advance formally declared inadmissible by the trial court during preliminary argument or colloquy; for the court's ruling relates forward to all possible offers of such evidence and renders them needless." 1 Wigmore, *On Evidence,* Section 17, page 318.

In the instant case the Trial Examiner very evidently followed this theory himself because he ruled that it was

unnecessary to offer cumulative offers of proof upon points on which he had once ruled. (Boeldt, 2A. 820-821.)*

The offers of proof of the Employer were also in sufficient detail to permit opposing counsel and the Trial Examiner to make an intelligent objection and ruling.

> "In other words, the Court and the opponent are entitled to an offer *specific enough* to permit of intelligent objection and ruling; whether the offering party need specify precisely the expected answer or only the general objective of the question, and whether he needs to volunteer this or may wait until the court requests it, and whether the context of the testimony may suffice for the purpose —these things must depend much upon the case in hand." 1 Wigmore, *On Evidence,* Section 17, page 319.
>
> "The terms of the offer made by counsel for plaintiff in error in the present case were sufficiently specific in their nature to enable the court to see that the proof contemplated by the offer, if made, would have a direct bearing either upon the amount of damages recoverable against plaintiff in error, or upon the question of the further liability of plaintiff in error." *Garvey* v. *Chicago Rys. Co.,* 339 Ill. 276, 171 N. E. 271, 275 (1930).
>
> "It is wholly immaterial whether the affidavits did or did not make a case for a new trial. The error consists, not in weighing, but in excluding the whole evidence, without regard to its weight. The court refused to pass any judgment on the

* The Trial Examiner stated "Mr. Pantzer, on those very elementary matters of practice there is no need for agreements of that character. You put, as I remember it, two witnesses on the stand. (The witnesses were not permitted to testify and Mr. Pantzer made offers of proof of what they would state.) There is no controversy on it. You have said this is cumulative, and we gain nothing and it simply delays our hearing." (2A. 820-821.)

sufficiency of the affidavits, while the record shows they contained material evidence." *Moore* v. *Coates,* 35 Ohio St. 177.

"Some point is made that a proper offer of evidence was not tendered by the defendant. A careful perusal of the colloquy between court and counsel establishes the fact that defendant's counsel said, in substance, that he had witnesses in court who were familiar with the horse before it was sold, and who would testify that it did not kick, bite, or act viciously while defendant had it. Whereupon the court informed him that such evidence would not be received. This was a sufficient offer under the circumstances." *Witt v. Voigt,* 156 N. W. Wis. 954 (1916).

The various colloquies between counsel for the Employer and the Trial Examiner, relating to the nature of the proofs Employer desired to adduce, and the reasons for considering them relevant and material, are referred to in the Post-Argument Brief of the Respondent in the Circuit Court of Appeals, at pages 15 to 19, both inclusive. Two colloquies, however, are called to the particular attention of the Court, in which the entire interrelationship of the acts of the unions constituting violence and justifying bad reputations, on the one hand, and their normal and natural effect upon the mind and motive of the Employer, on the other hand, were discussed. In addition counsel for the Employer set forth the chief legal authorities in support of excluded testimony at length. (2A. 782-789; 2A. 805-810.)

In conclusion upon this point, therefore, the Petitioner contends that its Petition for Leave to Adduce Additional Evidence was in good form and should have been granted.

Point Eight

The Circuit Court of Appeals Did Not Correctly Interpret the Contentions of the Petitioner

It must be perfectly evident from a perusal of this brief and the opinion of the Circuit Court of Appeals that the latter did not correctly interpret the contentions of the Petitioner in the Circuit Court of Appeals. (4A. 247-258.)

In the first place, the opinion devotes seven pages to ascertaining "whether substantial evidence supported the finding." (4A. 247, 248, 249-53.)

The issue as to whether substantial evidence supported the finding of the Board has never been raised or controverted by the Petitioner since the decision by the Labor Board. (See page 34 of the "Brief in Support of Respondent's Petition for Rehearing and Reargument" in the Circuit Court of Appeals, 4A. 302.)

The principal contention made by the Employer has consistently been, and is, that the Labor Board used novel and improper rules of exclusion with respect to relevant testimony on material issues tendered by the Petitioner.

In the second place, it is evidence the Circuit Court of Appeals did not analize the facts in the case correctly because its opinion proceeds upon the erroneous assumption that there is no testimony actually admitted in evidence or offered in evidence which attests to the reputation for violence, actual acts and threats of violence, and plan and conspiracy to effect the organizational ends of the unions by violence and acts of violence on the part of the unions,

their officers and affiliated members, **for a period of four years prior to the strike in the instant case.**

A. The erroneous assumption of the Court is documented in its opinion.

The erroneous assumption of the Court is thoroughly documented in its opinion by the following explicit references to the **four-year period** in question:

1. "The murder occurred some **four years prior to the period involved** in the instant case" and * * * "was committed by persons not employees of respondent, and **not now officers of the local**, except one person who had only been indicted, but not tried." (Opinion of Court, 4A. 255.)

2. "It could not have been helpful to the restricted labor dispute, which was all there was before the Board for decision, to go into the **past records**, violent, peaceful or criminal, of the Teamsters' Union, or into stories of violence which were **four years old.**" (Opinion of Court, 4A. 256.)

3. "If either party is to be tried and convicted upon the positions taken by it **before the Act was passed, or even after it was passed and before the Supreme Court ruled on its constitutionality**, the bitter fires of hate will be fanned rather than quenched." (Opinion of Court, 4A. 256.)

4. "It is not claimed that any of the union's present officers or members were parties to the past violences of the Teamsters' union in other industries, participated in, **long ago.**" (Opinion of Court, 4A. 256.)

5. "But on what theory this record should be permitted to prejudice respondent's employees **four years later, we cannot see.**" (Opinion of Court, 4A. 256.)

6. "The Board was dealing with the present, **not the past, action** of the union and its officials." (Opinion of Court, 4A. 256.)

7. "Respondent must recognize a union status different from what existed **in the past.**" (Opinion of Court, 4A. 256.)

8. "Respondent also complains because the Examiner permitted evidence to be received which showed it to be guilty of espionage of its employees' union activities in the **long past.** This objection would be met by the same answer as was made to disorderly activities of past teamsters' unions in Indianapolis, but for two distinguishing facts. The employer was the same employer. **Not so the employees.** The proof tended to show that some spying on employees' union activities never let up. On the other hand, the rough, illegal actions of the union in other fields, were—so it is argued and found by the Board—**not characteristic of the efforts of the union which respondent was opposing in 1940.**" (Opinion of Court, 4A. 256.)

B. The Specifications of Fact supporting Points V, VI, VII, and VIII, of the Petition for Rehearing in the Circuit Court of Appeals, thoroughly document the erroneous nature of the assumption of that Court.

A reference to the Specifications of Fact supporting Points V, VI, VII and VIII, of the Petition for Rehearing (4A. 271-290) thoroughly document how erroneous the assumption of the Court is that the Union, its officers and

members, did not, through the four-year period prior to the strike, continuously engage in the kind of conduct which characterized it in the *Penny Case*, 213 Ind. 586 (1938), 213 Ind. 560 (1938). It is most respectfully submitted that in light of the **actual record in the case**, as exemplified by the Specifications of Fact referred to, this Court cannot let the findings made by the Circuit Court of Appeals with respect to the complete absence of nefarious union activity during such four-year period, supervised by the same union officials who were active in the *Penny Case*, stand as set forth at pages 255 and 256 of its opinion.

The opinion of the Circuit Court of Appeals has, for the first time, raised a new and novel issue of fact, as to the accuracy of which the Record should be thoroughly dredged before the opinion of that Court is made permanent.

In connection with consideration of the plea of the Petitioner in this respect, it is respectfully prayed that the Court will consider that in making offers of proof, conservative counsel are more inclined to be governed by caution than abandon. Consequently, the facts set forth in offers of proof are more likely to be understatements than overstatements of fact. This is particularly true in the instant case, in which (a) certain of the testimony relating to violence and the organizational activities of the union was sought to be elicited from Joseph Emmett (Joe) Williams, Bruce (Red) Travis, and Hugh J. Gormley in cross-examination, which was never vouchsafed the Employer by the Trial Examiner, and in direct testimony, applications for subpoenas to afford which, were never granted by the Trial Examiner; (b) further testimony was sought to be

elicited from non-complainant strikers like Otto Boeldt and Walter Seering; (c) certain further testimony was sought to be elicited from actual complainants like Clarence Short and Ted Williamson; and (d) other testimony respecting violence was sought to be produced only at the expense of great fear as in the case of Cecil Fox, who was asked to testify against Vern Beaver. It will be recalled that Beaver warned Fox not to testify against him, saying: "You appear against me the 14th and I'll beat hell out of you and the union will back me up in it." (Resp.'s **Rejected** Ex. 106; 2A. 985-986; 3A. 1456.)

C. All of the Testimony Referred to in this Point of this Brief was Admissible under the Decisions of the Supreme Court of Indiana.

The leading case in Indiana respecting the admissibility of past acts of violence of labor leaders and their associates as evidence respecting present conspiracies, crimes and acts of violence, is that of *Peats* v. *State,* 213 Ind. 560 (1938). Because that case was one which involved Local 135 of the Teamsters Union (the same Local as in the instant case), and because it involved more particularly Joe Williams and his principal associates in that Union, a liberal quotation is here made from that decision.

> "Haygood, who was indicted with appellant, testified as a witness for the State. He said that appellant was his superior officer in the **Teamsters and Chauffeurs' Union**; that some truck drivers had been paying dues, and some had not; that appellant said to the witness that the heat was being put on him and he had to do something about it; that he did not care what was done just so it was done. The witness was on the pay roll of the union.

He said that **Peats** told him that he heard he was supposed to be going out nights, and was not going out, and that he was going with him to see what damage was being done; that an arrangement was made by which appellant was to meet the witness that evening; that: 'We were to get the truck and he was to follow behind and whatever we got he was to see how much damage was done. I mean by "get the truck" to stone the trucks'; that the witness got **Crickmore** and two women in the car. They got 20 or 25 rocks and some pieces of concrete; that he waited at the appointed place, and a car such as **Peats** drove came down the road behind him, flashed its lights, and slowed down. The witness pulled out, and the car behind followed him. The cars went west until they saw a Kroger truck driving east. They turned around and followed the truck, passed it, and returned to meet it. The occupants of the witness' car each got a rock or brick, and they drove toward the truck at the rate of 70 miles an hour. As they approached the truck they threw rocks at it. They heard the rocks hit. They returned to Indianapolis. The witness saw appellant the next morning. **Williams**, another defendant, came to him in the morning and told him that things were getting hot, and gave him some money, and told him to leave town. He went to Louisville. **Peats** and **Williams** came to Louisville after him in four or five days. **Peats** said everything was all right, to come back; that there had been no police or detectives around the office. **Peats** paid him the amount of his hotel bill in Louisville. **Peats** told him that if any one was picked up to keep their mouths shut; and that 'they would furnish a lawyer to get us out of jail immediately'; that **Peats** paid for the Buick sedan in which they were driving when the attack on the truck was made. He said that **Peats** and **Williams** told him the reason they wanted to meet him on

the night in question was that there had been some complaints about him going out on the road and not doing anything. The witness said that during all of the time he was connected with the union they attempted to get Kroger drivers unionized; that some of them belonged to the union, and some did not; that: 'We did this by talking to the drivers and by often throwing rocks at Kroger trucks on the highways. Most of this was done by myself, **Victor Crickmore, Joe Williams, Harry Peats** and a few other members, who could be trusted by the officers'; that **'Peats suggested** that if we would bump off a Kroger driver, Kroger would fall into the union, and that we could get a lot more new members into the union.' He said that he had orders from **Peats** to talk to the men and try to get them to join the union, and, if they would not join, then to use force, and that he also had orders to go out and break the window lights out of Kroger stores. There was evidence that, on the night referred to by the witness, when they threw the stones and bricks at a Kroger truck, the truck ran off the road, and, when passersby approached, Penny, who was charged to have been murdered, was in the truck seat, bleeding from a head injury, semiconscious, and that he afterwards died from the injury. There was testimony of other witnesses that **Peats** said to an employer of truck drivers that, unless their drivers joined the union, stones and brick-bats would be thrown through their windshields, and that he **Peats,** would be at home, in bed, when it was done. Appellant testified as a witness that he was at home, in bed. A truck driver testified that he had been violently assaulted by the witness **Haygood, Peats,** Peats' father, and others, at a gasoline station where he stopped his truck. There was evidence of other circumstances which had a tendency to corroborate the testimony of the witness **Haygood.**

Appellant contends that **Haygood** was conclusively impeached, and that his evidence was the only evidence connecting appellant with the offense, and that, since **Haygood's** testimony was not corroborated, there must necessarily be a failure of proof. Haygood was disputed, but, as pointed out, there was much evidence tending to corroborate him. Whether his testimony was to be believed was for the jury to determine. By its verdict it has indicated that, upon all of the evidence, it believed appellant was guilty, and this court cannot disturb that conclusion.

It is contended that there is no evidence that any of the accused indicted with appellant threw the rock which struck the deceased. But that was not necessary, if it was thrown in furtherance of a plan, aided and abetted by appellant. It is immaterial whether any of the conspirators, or persons acting for them, other than appellant, was indicted."

"Error is predicated upon the admission of evidence concerning attacks upon trucks and truck drivers, by throwing rocks, and of plans to attack other trucks and truck drivers, both before and after the attack which was the basis of the indictment. There was evidence of a plan or scheme, participated in by appellant, to attack trucks and truck drivers who were not members of the union, and that appellant was one of the directing forces in the plan and in the attacks. As the court correctly instructed the jury, any evidence which tended to corroborate the testimony of the witness **Haygood** that appellant had directed the attack which caused the death of Penny was competent, and, since there was evidence that this particular attack was only one of many contemplated by appellant's plans, it was competent to show that he threatened, instigated, or participated in similar

> activities, for the purpose of showing motive, intent, or guilty knowledge. It is clear that the testimony of **Haygood** that he was directed by appellant to attack Kroger trucks is corroborated and strengthened by showing that appellant threatened such attacks and participated in similar attacks. In murder cases, previous assaults or attacks upon the person killed are always admissible to show intention or malice. Here there is evidence that appellant and others entered into a common purpose and design to attack not one person, but a class of persons, truck drivers who had not joined their union. The malice and intention to injure was not directed against a particular individual, but against a class, and evidence that appellant aided or participated in, or counselled or encouraged, similar attacks against members of the class, is clearly competent to show malice toward Penny, who was one of the class, a design and purpose that the thing should be done which resulted in his death. It is well settled that collateral crimes may be proven where they tend to prove motive, malice, guilty knowledge, or intention. *Sanderson* v. *State*, 1907, 169 Ind. 301, 82 N. E. 525; *Card* v. *State*, 1886, 109 Ind. 415, 9 N. E. 591."

The foregoing authority is therefore ample to establish that the Trial Examiner was entirely unwarranted in refusing to admit evidence of the previous and collateral crimes of the Unions and their various representatives and members.

In *Crickmore v. State*, 213 Ind. 586, 12 N. E. (2nd) 266 (1938), the Supreme Court of Indiana said:

> "The evidence for the State is substantially the same as in the **Peats** Case. In addition, there was the testimony of a police officer that **Crickmore** had made a statement to him in all substantial

respects conforming to **Haygood's** testimony. He testified that **Crickmore** told him that he had been hired 'to go out and rock trucks of non-Union men.' There was also the testimony of **Haygood** and two women that **Crickmore** was in the car with them, and threw 'rocks' through the windshield of the car in which Penny was riding. Appellant's defense was an alibi. He testified that he was not present when the offense was committed; that he was elsewhere.

He complains of the admission of evidence of other crimes. The evidence complained of was substantially the same as that described in the **Peats** Case. A prima facie case was made, showing that he was a party to a conspiracy or a plan to systematically stone trucks driven by non-union drivers. The evidence was competent."

In conclusion upon this Point of this Brief, it is therefore submitted that the Circuit Court of Appeals has not correctly analyzed the record in this case, nor the contentions of the Petitioner.

Point Nine

Conclusion

In conclusion, the Petitioner respectfully requests that this Petition for Rehearing be granted; that the denial by this Court of the Petition for a Writ of Certiorari be set aside; and that such writ be granted and forthwith issued.

Respectfully submitted,

KURT F. PANTZER,

CHARLES M. WELLS,

Counsel for Petitioner.

CERTIFICATE OF COUNSEL AS TO GOOD FAITH AND ABSENCE OF DELAY

The undersigned, Kurt F. Pantzer, one of the attorneys for Acme-Evans Company, the Petitioner in this case, and senior counsel before the Supreme Court, hereby certifies that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Dated this 31st day of March, 1943, at Indianapolis, Indiana.

KURT F. PANTZER (Sgd.)